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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1486

CHARLES A. MITCHELL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONER

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I

We respectfully submit that the Brief for the United States in Opposition (cited "BO, p. —") buttresses our argument that the writ of certiorari should be granted.

The parameters of the word, "forged", as used in Section 2314 are well established. See: *Gilbert* v. *U.S.*, 370 U.S. 650, 656-59 (1962). On the other hand, the term, "falsely made", is of fairly recent legislative origin without the benefit of a definition in any of the other sections of the criminal code in which it is employed.

The legislative history gives no clue as to the meaning intended by Congress. [BO, p. 7] It is not, therefore, surprising that there is wide disagreement among the various circuits as to the meaning of the term. See: *Annotation* (1970), 4 A.L.R.Fed. 793, 797-798.

On the undisputed facts of this case, had Petitioner been indicted in any one of the 37 states comprising the Second, Fourth, Sixth,[1] Seventh, Eighth,[2] Ninth and Tenth Circuits, his preliminary motions to strike Counts Two, Three and Five of the indictment [Pet., 13a-15a], and his motions for a directed verdict of "Not Guilty" on those counts would have been sustained on the ground they failed to charge an offense against the United States. In the 7 states comprising the First and Third Circuits and the District of Columbia, we suggest the courts might well have followed the majority, better-reasoned rule and sustained similar motions.

We say again, guilt or innocence of a defendant under federal indictment should not be dependent upon the geographical location of the Court in which he is tried.

II

In *Garner* v. *Louisiana*, 368 U.S. 157 (1961), the Court's inquiry was not as to the sufficiency of evidence, but on whether the convictions rested upon *any* evidence

[1] *U. S.* v. *Tucker*, 473 F.2d 1290 (6th Cir., 1973), is bottomed on a sight draft executed in the name of a fictitious person. There are no fictitious parties in this case.

[2] *Pines* v. *U. S.*, 123 F.2d 825 (8th Cir., 1942), involved "U. S. Dollar Travelers Cheques" and a "Circular Letter of Credit" purportedly issued by the Gotham Trust Company of New York, a non-existent institution. *U. S.* v. *Lipscomb*, 546 F.2d 787 (8th Cir., 1976), involved an instrument drawn on a non-existent drawee. In the case at bar, it is undisputed that the Columbus Savings & Loan Association was a genuine, existing association, and that the savings certificates involved were issued by it and signed by an authorized officer.

which would support a finding that petitioners' acts caused a disturbance of the peace, that being the charge upon which they had been convicted. In connection with that inquiry, this Court said:

> "In addition, we cannot be concerned with whether the evidence proves the commission of some other crime, for it is as much a denial of due process to send an accused to prison following conviction for a charge that was never made as it is to convict him upon a charge for which there is no evidence to support that conviction." 368 U.S. at 165.

We suggest, *a fortiori*, that it is a denial of due process to send this Petitioner to prison on evidence that might prove the commission of other crimes upon which he was indicted and found "Not Guilty".

In this case, Petitioner was indicted and tried on Count One [Pet., 9a-13a] with Boyd L. Hobbs ("Hobbs") for a conspiracy (1) to knowingly make false statements and over-value securities for the purpose of influencing the action of federal reserve banks or banks with FDIC-insured deposits on loans to Hobbs, and (2) to transport, with unlawful and fraudulent intent, falsely made securities in interstate commerce, in that Petitioner would issue back-dated savings certificates of The Columbus Savings and Loan Association for which funds had not been deposited, and Hobbs would transport them in interstate commerce and would pledge and assign them to banks as security to influence their action on loans to Hobbs.

On this count, the jury found Petitioner "Not Guilty".

Petitioner was indicted and tried on Count Four [Pet., 14a] charging he made such a false statement for the purpose of influencing the action of The Citizens Bank of Hattiesburg, Mississippi, on a loan to Hobbs by making and issuing an Association savings certificate number

9077, in the amount of $150,000, dated October 20, 1972, knowing it had been back-dated and the funds represented by said certificate not deposited with the Association.

On this count, the jury found Petitioner "Not Guilty".

Counts Two, Three and Five [Pet., 13a-15a] charged Petitioner with having transported specific savings certificates as "falsely made securities" in interstate commerce in that they had been back-dated and in that funds represented by the securities were not on deposit with the Association. The specific savings certificates named in these counts were numbers 7960, 9071, 9072, and 9077, and the inquiry should be into whether these specific certificates were "falsely made". It is admitted that each was back-dated, and the evidence is undisputed that each was a genuine certificate executed by an authorized officer, that Hobbs gave his check for each before delivery, that each was assigned by Hobbs to the pledgee bank, and that each assignment was acknowledged *before delivery* to Hobbs and *before transport* in interstate commerce.[3] The only possible question would be whether Hobbs' checks would have been good if immediately presented for payment.[4] The evidence is totally inconclusive on this point. Hobbs testified that during this period he had a cash flow of over $100,000 per day, and that without consulting his records he could not say whether there would or would not have been sufficient funds to cover any specific check. [T. 529, 587] There is *no* evidence that checks given in payment for the specific savings certificates named in Counts Two, Three and Five would not have been good.

Petitioner went to trial in the district court prepared to defend the specific charges in the indictment. With the magic wand of the conspiracy charge, he found the evidentiary flood gates opened and was put to a defense, not on the offenses charged in the indictment, but on the unstated charge that he had caused substantial losses to the Association as a result of misplaced trust in Hobbs. [T. 201-209]

It is apparent to us that Respondent seeks to sustain the convictions under review, not by addressing the question of whether these four certificates were or were not "falsely made", but by reliance upon evidence material and relevant only to the charges of conspiracy and making false statements to a bank to influence loans *upon which Petitioner was acquitted.*[5] [BO, p. 3-6; p. 7, footnote 7]

[3] Respondent apparently concedes that the certificates were valid obligations of the Association as to the pledgee banks [BO, p. 5, footnote 6]. The evidence is undisputed that the assignments were executed by Hobbs and acknowledged by the Association in writing *before* entering interstate commerce. Thus the securities transported in interstate commerce, being valid obligations, could not be "falsely made".

[4] *Had* the United States wanted to introduce evidence on this point, it would have been a simple matter. Its evidence traces each of Hobbs' checks into an Association deposit. All needed would have been for the United States to subpoena a microfilm of each check from the bank in which it was deposited, and the ledger sheet of the Hobbs account upon which it was drawn covering a period that included the date the check was written and the date it was charged to the account. This would be the "best evidence" and easily obtained with the Government's resources, but it was certainly not offered at trial.

[5] We do not respond to mis-statements in Respondent's brief solely because we consider it inappropriate to argue the merits of the case on petition for a writ of certiorari. This is not to say we agree with Respondent's statement of the case. For example, " 'cash flow or cash shortage problems' as a result of unsound loans" [BO, p. 3] relates, not to the Association's actual liquidity, but to Petitioner's policy of money management to maximize cash in interest-bearing investments and to minimize the amounts in non-interest bearing checking accounts on which the association had to pay interest to its depositors. [T, 887-890] At all times, as to which the examination related, the Association had $2,500,000 in bank CD's against which it could borrow to cover any actual overdraft [T, 945]. The "shortages" or overdrafts would occur *only* if all outstanding checks were to be presented at once, which did not happen. [T, 889].

CONCLUSION

There is a pressing need to establish parameters for the term, "Falsely made". There is no assistance from the legislative history of Section 2314. The Fourth, Seventh, and Tenth Circuits say that "falsely made" means the same thing as "forged". The Second and Ninth Circuits say that a genuine check or draft does not become "falsely made" because there are insufficient funds for the check or because spurious supporting documents are attached to the draft. The Sixth and Eighth Circuits say that use of a fictitious drawer or drawee makes a draft "falsely made". The Fifth Circuit presses to the limit in *U.S.* v. *Hagerty*, 561 F.2d 1197 (5th Cir. 1977), holding an unauthorized draft on the account of an existing person becomes "falsely made". Here, the Fifth Circuit's "determination of 'falsely made' is not limited to the genuineness of the execution of a document. * * * we go beyond the execution of the CD's and review the underlying facts we find fully enough evidence to uphold a finding by the jury [6] that the security was 'falsely made' ". [Pet., p. 4a] If the court "goes beyond" the term, "falsely made", then this conviction rests on something "beyond" Section 2314, and violates due process.

We suggest there is a pressing need for this Court to set the limits for the term, "falsely made", purely aside from considerations of dishonor, shame,[7] and loss of substantial citizenship rights. Petitioner will suffer if this conviction stands.

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[6] With deference, whether an instrument is "falsely made" is a question of law—not a question of fact to be found by a jury.

[7] E.g., "Your daddy is a convict".

For these reasons, here and in the petition, the writ should be granted.

Respectfully submitted,

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